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CHARLES ELMORE CROPL
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 275

NORTH COAST TRANSPORTATION COMPANY AND INDEPENDENT STAGES, INC.,

Appellants,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION AND WEST COAST BUS LINES, LTD., ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.

MOTION TO AFFIRM OF WEST COAST BUS LINES, LTD.

HENRY F. WALKER,
ARTHUR H. GLANZ,
Counsel for West Coast Bus Lines, Ltd.,
Appellee.

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IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

CIVIL No. 22528-S

NORTH COAST TRANSPORTATION COMPANY, A CORPORATION, AND INDEPENDENT STAGES, INC., A CORPORATION,

Plaintiffs-Appellants,

vs.

THE UNITED STATES OF AMERICA,
Defendant-Appellee,

and

WEST COAST BUS LINES, LTD., A CORPORATION, INTERSTATE COMMERCE COMMISSION ET AL.,
Intervenors-Appellees.

MOTION TO AFFIRM.

Appellee, West Coast Bus Lines, Ltd., hereinafter referred to as "West Coast", pursuant to Rule 12, paragraph 3, moves that the decree of the District Court be affirmed.

This is a direct appeal from the Final Decree [1] of a specially constituted District Court of three judges, established

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[1] The District Court rendered an opinion, dated March 2, 1944, which is reported in 54 Fed. Supp. 448. The opinion was filed on March 3rd. On March 3rd, an "order", dated Feb. 29, was filed vacating the temporary injunction and dismissing the complaint and making provision for the submission by defendant of "findings of fact and conclusions of law in con-

pursuant to the Urgent Deficiencies Act of October 22, 1913, vacating a temporary injunction and dismissing a complaint seeking to set aside an order of the Interstate Commerce Commission.[2]

The Commission's order, dated October 6, 1942, granted West Coast a certificate of public convenience and necessity under Section 207 of the Motor Carrier Act (49 U. S. C. A. 307) to operate as a common carrier by motor vehicle of passengers between San Francisco and Seattle, serving intermediate points, and denied West Coast's application in all other respects. Appellants, operators of similar service over the portion of the route between Portland and Seattle, brought suit to set aside the Commission's order at least in so far as it granted West Coast authority between these points. West Coast and others intervened as defendants.

In its application to the Commission, West Coast sought a certificate authorizing operations between Phoenix, Arizona and Seattle, Washington, via Los Angeles, San Fran-

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formity with Rule 52(a) FRCP." Appellants appealed from this "order", the appeal being allowed on April 18. Service of the documents referred to in Rule 12, paragraph 2, was made on counsel for West Coast on April 21. A document entitled "Position of West Coast Bus Lines, Ltd., re Appeal and Stay by Trial Court", dated April 21, was filed by West Coast on April 22. In point 1 of this document West Coast set forth its position that the "order" dated February 29th was but a preliminary order and not appealable. On May 17th, appellees The United States of America and Interstate Commerce Commission, mailed to counsel for appellants and for the other appellees their "Motion to Affirm".

On May 9th, the District Court filed its Findings of Fact and Conclusions of Law and a Final Decree. Appellants appealed from this Final Decree, the appeal being allowed on June 10, 1944. Service of the documents referred to in Rule 12, paragraph 2, was made on counsel for West Coast on June 14th. The instant Motion to Affirm is directed to this latter appeal, it being West Coast's position that the "order" of Feb. 29 was but a preliminary order and not appealable.

[2] The Commission's decision is reported in 41 M. C. C. 269. An earlier report of Division 5 appears in 32 M. C. C. 619.

cisco, and Portland. The application therefore proposed operations to be conducted involving four states. Under Section 205 (a) of the Motor Carrier Act (49 U. S. C. A. 305 (a)), the Commission referred the application to an examiner for hearing.[3] Proof adduced at the hearing principally related to proposed operations between San Francisco, California and Seattle, Washington.[4] Appellants, at the conclusion of the introduction of evidence by West Coast, moved that the Examiner proceed no further, and assign the matter to a Joint Board. There was no charge of bad faith. This was the first indication of appellants' position in this regard. The motion was denied by the Examiner, and thereafter appellants presented it to the Commission, where it again was denied.

In the Motion to Affirm, filed by appellees The United States of America and Interstate Commerce Commission, the facts were well and succinctly set forth. The following two paragraphs are quoted therefrom and made a part of the instant motion:

"On the merits, the Commission's report points out that there is presently a monopoly of bus transportation between Seattle and San Francisco. Between San Francisco and Portland, bus service is furnished only by the

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[3] Section 205(a) provides in part:

"The Commission shall, when operations of motor carriers or brokers conducted or proposed to be conducted involve not more than three States, and the Commission may, in its discretion, when operations of motor carriers or brokers conducted or proposed to be conducted involve more than three States, refer to a joint board for appropriate proceedings thereon, any of the following matters arising in the administration of this part with respect to such operations as to which a hearing is required or in the judgment of the commission is desirable: Applications for certificates, . . ."

See, also, Interstate Commerce Act, Section 17 (49 U. S. C. A. 17.)

[4] As noted, the Commission's order granted a certificate for operations between San Francisco and Seattle and denied the application in all other respects.

Pacific Greyhound Lines[5] which operates what may be described as a first-class bus service, and its subsidiary,[6] Dollar Lines, which operates what is known as a second-class, low-priced service. Similarly, between Portland and Seattle, service is provided only by appellant North Coast Transportation Company, which conducts first-class bus service, and appellant Independent Stages, Inc., a wholly owned subsidiary of North Coast, which conducts second-class service. Furthermore, because Pacific Greyhound controls Dollar Lines and because North Coast controls Independent Stages, the Commission found that there was no 'real independence of action in matters in which these parties would normally be opposed' (41 M. C. C. at 289). These monopoly conditions were found to have contributed materially to certain deficiencies found to exist in the service of the above carriers, such as insufficient schedules, overcrowding, improper equipment, and employee discourtesy. The Commission found also that insufficient and unsatisfactory second-class service was purposely provided in order to discourage the use of such cheaper service and to compel the use of the affiliated higher priced service. The Commission found that applicant's proposed service was clearly adequate, and promised effective competition with the existing services. In view of the increasing population and increasing bus traffic in the area to be served, as well as the high past earnings of the existing operators, the Commission found that the territory involved would support applicant and that its entry into the field would not jeopardize in any degree the existing carriers.

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[5] The Southern Pacific Company, whose railroad operates between Portland and San Francisco, owns 39.03 per cent of the stock of Pacific Greyhound.

[6] Pacific Greyhound owns 40% of the stock of Dollar Lines, 60% being owned by a Standard Oil subsidiary. Standard Oil sells Pacific Greyhound $600,000 to $700,000 worth of petroleum products annually, and permits Pacific Greyhound to have a free hand in the management of Dollar Lines.

On these and other findings, the Commission made the ultimate finding that the present and future public convenience and necessity required applicant's operation between San Francisco and Seattle.

"The record before the Commission leading to its order of October 6, 1942, was closed on October 5, 1938. On December 12, 1942, appellants filed a petition for rehearing alleging that certain designated changes in conditions, occasioned in most instances by the war, had occurred since the closing of the record, and offering to submit proof concerning them. In this petition, it was alleged specifically: that under regulations of the Office of Defense Transportation applicant would be unable to secure from that agency the required authority to operate; that under the regulations of that agency and of the War Production Board applicant could not secure the necessary buses, operate the proposed number of schedules, furnish service within the 90-day period it proposed before commencing operations, or meet the time schedules it proposed; that applicant would be unable to secure intrastate rights in Washington and that its operations would thus be limited operations forbidden by Office of Defense Transportation regulations; that existing carriers had reduced their rates and improved their service since the closing of the record; and that by reason of changed conditions affecting operating costs and revenues, applicant could not operate on the basis it proposed without suffering serious financial losses such as to jeopardize its chances of continued operation. Applicant on January 4, 1943, filed an extensive reply to this position, following which the Commission on February 1, 1943, denied the petition for rehearing."

Five principal contentions were advanced by appellants in the court below: (1) that the Commission had no jurisdiction to proceed other than to grant appellants' request that the matter be withdrawn from the examiner and re-

ferred to a joint board and therefore that the Commission's order was a nullity; (2) that the Commission made no sufficient findings to support its order; (3) that the evidence was not sufficient to support the Commission's order; (4) that appellants were deprived of their property without due process of law in violation of the Fifth Amendment by the order of the Commission in authorizing West Coast to operate as a competitor along their route; and (5) that the Commission's denial of their petition for rehearing because of "changed conditions" was an abuse of discretion and deprived them of a fair hearing.[7] One additional contention is found in appellants' "Assignment of Errors," based upon the matter set forth in footnote "1", *supra*,

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[7] In their Jurisdictional Statement, served and filed in connection with their appeal from the Final Decree of May 9, 1944, appellants state that they "rely mainly upon three principal grounds of appeal" which are set forth in summary form by appellants as follows:

> "(a) The report and order of the Commission and the inferences or statements in the report upon which the order was based (here regarded as 'findings') are not supported by any substantial evidence, and are, in fact, contrary to the evidence.
>
> "(b) It was not the intent of West Coast Bus Lines, Ltd., either at the time of the hearing or at the time of filing the application, or at any other time, to serve more than three states and it was therefore mandatory under the provisions of Section 205 of the Motor Carrier Act (49 U. S. C. A. 305) to refer the matter for hearing and primary decision to a joint board of the three states in which alone the applicant sought to operate.
>
> "(c) Owing to the unprecedented and radical changes in conditions between the time of the hearing in 1938 and the final decision in 1942, the Commission should have granted a further hearing for which appropriate application was made, and the failure to reopen the proceedings was a denial of the right to a fair hearing, particularly in view of the fact that the Office of Defense Transportation had in the meantime, in conformity with the national policy to eliminate and curtail all unnecessary duplications in service, and prior to the final decision of the Commission, required curtailment of the bus services rendered by the plaintiffs herein."

It is noted that of the five contentions advanced by appellants in the court below, contentions 2 and 4 are not mentioned as being those principally relied upon by appellants on appeal.

i. e., (6) that the Court was without jurisdiction to make or enter Findings of Fact or Conclusions of Law or the Final Decree on May 9, 1944, following the order dated February 29, 1944, and the allowance of an appeal therefrom on April 18, 1944.

In support of these six contentions, and for purposes of appeal, appellants have specified some thirty-four "Assignment of Errors".[8] It is submitted that none of these contentions present any substantial question, that the questions on which the decision of this cause depends are so unsubstantial as not to need further argument, and, therefore, that the decree of the District Court should be affirmed without further argument.

1. Appellants' first contention—that the Commission erred in refusing to take the matter from the Examiner and reassign it to a joint board—is without merit. Section 205 (a) of the Motor Carrier Act (49 U. S. C. A. 305 (a)), quoted *supra,* footnote "3", requires the Commission to refer certain matters to a joint board "when operations conducted or proposed to be conducted involve not more than three States", but does not require such reference when operations "conducted or proposed to be conducted involve more than three States". In this latter situation, it is left to the discretion of the Commission whether reference should be to a joint board or to an examiner. (Section 205 (a), *supra.* See, also, Interstate Commerce Act, Section 17 (49 U. S. C. A. 17). Here, West Coast's applica-

[8] The practice of making so many assignments of error to support so few contentions has been severely condemned by the Supreme Court and it has been stated that such may result in a dismissal of the appeal. (*Patterson* v. *Mobile Gas Co.*, 271 U. S. 131, 70 L. ed. 870, 46 S. Ct. 445; *Local 167, International Brotherhood of Teamsters, etc.*, v. *United States*, 291 U. S. 293, 78 L. ed. 804, 54 S. Ct. 396; *Central Vermont R. Co.* v. *White*, 238 U. S. 507, 59 L. ed. 1433, 35 S. Ct. 865; *Chesapeake & D. Canal Co.* v. *United States*, 250 U. S. 123, 63 L. ed. 889, 39 S. Ct. 407; *Phillips, etc., Const. Co.* v. *Seymour*, 91 U. S. 646, 23 L. ed. 341.)

tion involved operations proposed to be conducted in more than three States. The Commission referred it to an examiner for hearing. The proof related substantially to three States. The issue, therefore, is—Where a matter properly has been referred to an examiner, is it mandatory upon the Commission to take it from the examiner and reassign it to a joint board if the proof before the examiner as to some State or States is inadequate or wholly lacking and the remaining number of States is three or less. To state the issue is to answer it. Appellants' position finds no support in the statute. As stated by Division 5 of the Commission (32 M. C. C. 621) and adopted by the full Commission (41 M. C. C. 270) and quoted by the District Court in its opinion: "In the absence of any showing of any intentional deception or fraud, an application, once lawfully referred either to an examiner or to a joint board of either three or two members, may properly be disposed of by such referee, even though during the course of the hearing applicant wholly fails to support or otherwise abandons his proposal as to one or more states, so that the number actually finally involved is less than originally appeared. Any other conclusion would tend to uncertainty and confusion. In innumerable hearings, jurisdictional issues, requiring final determination before proceeding, would arise as to whether or not there had been a failure of proof as to a particular state." The District Court found that there was no fraud, bad faith, or deception on the part of West Coast in making and filing its application for authority to operate in four states (Finding 3). At the hearing before the Examiner when making their motion, appellants expressly stated that they made no claim of bad faith.[9]

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[9] At the hearing, appellants were represented by Mr. Clifford and the following proceedings occurred: *"Examiner Croft:* I would be inclined to grant your motion, Mr. Clifford, if I thought for a moment there was the slightest thing in the record to indicate bad faith, or any attempt to de-

2. Appellants' second contention—that the Commission did not make sufficient findings to support its order—cannot be supported. It is not found in the "three principal grounds" upon which appellants state they "mainly rely" on this appeal. (See, Appellants' Jurisdictional Statement, *supra*, footnote "7".) The report of the Commission (41 M. C. C. 269) contains numerous findings, both preliminary and ultimate. "There are no formal requirements for the findings to be made by the Commission in this type of case" (*United States* v. *Louisiana*, 290 U. S. 70, 78 L. ed. 181, 54 S. Ct. 28) which does not include an award of damages. (*Manufacturers Ry. Co.* v. *United States*, 246 U. S. 457, 62 L. ed. 831, 38 S. Ct. 383.) The report, read as a whole, contains more than ample preliminary findings affording a rational basis for its ultimate finding that present and future public convenience and necessity required the granting of this certificate. The question of public convenience and necessity is one of those ultimate questions of fact for determination by the Commission which is composed of experts. The determination thereof by this expert body will not be disturbed if there is a rational basis therefor in the Commission's report. *I. C. C.* v. *City of Jersey City*, — U. S. —, decided May 29, 1944; *Rochester Telephone Corp.* v. *U. S.*, 307 U. S. 125, 83 L. ed. 1147, 50 S. Ct. 754; *Mississippi Valley Barge Line* v. *U. S.*, 292 U. S. 282, 78 L. ed. 1260; 54 S. Ct. 692. It is established law that the Commission may permit a new service for the purpose of providing the benefits of reasonable competition in an area, where as here, a virtual monopoly exists. (*Chesapeake & Ohio Ry. Co.* v. *United States*, 283 U. S. 35, 75 L. ed. 824, 51 S. Ct. 337.)

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ceive the Commission or prospective third parties. *Mr. Clifford:* I am not charging bad faith. *Examiner Croft:* I know you are not." (Commission's Transcript 1311.) Nevertheless, in paragraphs III-V of their assignments of error, appellants seek to raise, on appeal, the issue of bad faith.

3. Appellants' third contention—that the Commission's order is not supported by the evidence—is groundless. The sufficiency of the evidence was raised by appellants before the full Commission and again before that body by way of petition for reconsideration. The contention was overruled by the Commission. The District Court in its written opinion stated: "The record shows ample and convincing evidence to support the finding of the Commission that the public interest would be served by permitting a competing carrier to operate in plaintiffs' territory."[10] (See also: Finding 6.) It is elementary that the weight and credibility to be given to the evidence is for the Commission and that the conclusions of the Commission must be sustained if supported by substantial evidence. (*The New England Divisions case,* 261 U. S. 184, 67 L. ed. 605, 43 S. Ct. 270; *Western Paper Makers' Chemical Co.* v. *United States,* 271 U. S. 268, 70 L. ed. 941, 46 S. Ct. 500; *State of Ohio* v. *United States,* 292 U. S. 498, 78 L. ed. 1388, 54 S. Ct. 792.)

4. Appellants' fourth contention—that they have been deprived of property without due process of law in violation of the Fifth Amendment by an order permitting a competitor to enter their area—is equally without merit. Appellants' authority to operate was not exclusive; their operation, without competition, was a privilege to be enjoyed as long as existing but was not a legal right. They had no property right to be free from competition, and the order of the Commission permitting a competitor to operate in the area invades no property right of the appellants. (*Indian Valley Ry Co.* v. *United States,* 52 F. (2d) 485, affd., 292 U. S. 608, 78 L. ed. 1469, 54 S. Ct. 775; *Tennessee Power Co.* v. *T. V. A.,* 306, U. S. 118, 83 L. ed. 543, 59 S. Ct. 366.) The

[10] In the court below, appellants limited their contention to the sufficiency of the evidence to show public convenience and necessity in the Portland-Seattle area.

fact that, under regulations of the Office of Defense Transportation, the operations of appellant Independent Stages have been suspended and its equipment taken over and operated by the parent company, appellant North Coast, presents no reason for a different conclusion. As aptly stated by the District Court: "A company whose output is curtailed by rationing obviously may not on that ground keep competitors out of its field. No more may plaintiffs; for after a valid determination that the public would be benefited by the operations of a competing carrier, the right of West Coast to operate is equal to plaintiffs' and subject to the same restrictions." Furthermore, under the operation by North Coast of the combined equipment of appellants, they have substantially increased their profits.

5. Appellants' fifth contention—that the Commission was required to grant their petition for reconsideration because of "changed conditions"—is wholly without merit. The contention is predicated upon the entry of the United States into war following the close of the record and the subsequent creation of various wartime agencies, such as the Office of Defense Transportation, War Production Board, etc. Many of the arguments advanced by appellants under this contention related to predictions of what these other agencies would or would not do. Obviously, the Commission was not and could not be called upon to prejudge or predict what action the various agencies might take with respect to West Coast and the commencement of its operations. It is not every change in conditions which would require the Commission to reconsider a matter. (*United States* v. *Northern Pacific Ry. Co.*, 288 U. S. 490, 77 L. ed. 914, 53 S. Ct. 406.) The subject of "changed conditions" recently was before the Supreme Court and a decision rendered which is determinative of this contention adversely to the appellants. (*Interstate Commerce Commission* v.

City of Jersey City (May 29, 1944), — U. S. —, — L. ed — S. Ct. —.)

6. Appellants' sixth and last contention—that the Dist Court had no jurisdiction or power to make or enter F ings and Conclusions or its Final Decree after the "ord dated February 29, 1944—is equally without support in authorities.[11] It is the position of West Coast, as state the "Position of West Coast Bus Lines, Ltd., re Appe etc., that the "order" dated February 29th, 1944, was b preliminary order; that it was not a final decree; and th fore that it was not appealable. Furthermore, even if order of February 29th be considered as a final appeal decree, such would not render it reversible error for District Court thereafter to make and file its findings conclusions. (*Panama R. Co.* v. *Beckford,* 231 Fed. See, also, *Gibbs* v. *Buck,* 307 U. S. 66, 77-78, 83 L. ed. 1 59 S. Ct. 725.) No possible prejudice could result to ap lants and no substantial right of theirs has been affec (28 U. S. C. A. 391. See, also, Rule 61, Federal Rule Civil Procedure.)

For the foregoing reasons this appeal presents no stantial question. It is, therefore, respectfully submi that the decree of the District Court should be affirmed w out further argument.

Dated: June 23, 1944.

HENRY F. WALKER,
ARTHUR H. GLANZ,
Attorneys for West Coast Bus Lines, Ltd.,
Appellee-Interveno

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[11] The facts pertaining to this contention are set forth in footnote *supra.*

Joinder in Motion.

The undersigned Intervenors-Appellees herein join in the foregoing motion.

NATIONAL TRAILWAYS SYSTEM,
BURLINGTON TRANSPORTATION COMPANY,
SANTA FE TRAIL TRANSPORTATION COMPANY,

By JONATHAN C. GIBSON,
RUSSELL B. JAMES,
WILLIAM F. BROOKS,
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Their Attorneys,
560 So. Main Street,
Los Angeles 13, California.

The undersigned appellees join in the foregoing petition.

FRANK J. HENNESSY,
United States Attorney,
By W. E. LICKING,
Asst. U. S. Atty.
NELSON THOMAS,
Attorney for Interstate Commerce Commission.

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